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Nos. 89-1452, 89-1453

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., *et al.*,
Petitioners,

v.

UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

On a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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August 9, 1990

QUESTION PRESENTED

Amicus will address the following issue:

Whether the court of appeals improperly relied upon selected portions of the legislative history of the Natural Gas Policy Act of 1978 to override the plain meaning of the statute and set aside action by the Federal Energy Regulatory Commission consolidating all vintages of old gas and establishing a higher ceiling price for the consolidated vintages.

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INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center

with more than 125,000 members and supporters nationwide. WLF engages in litigation and the administrative process in a variety of areas promoting the economic and civil liberties of individuals and businesses.

To this end, WLF has filed briefs *amicus curiae* before this Court in a number of cases. *See, e.g., International Union v. Johnson Controls, cert. granted,* 58 U.S.L.W. 3614 (March 26, 1990); *Ingersoll-Rand Co. v. McClendon, cert. granted,* 58 U.S.L.W. 3657 (April 16, 1990); *Pacific Mutual Life Insurance Company v. Haslip, cert. granted,* 58 U.S.L.W. 3628 (April 2, 1990); *Kansas and Missouri v. Utilicorp United Inc.*, 58 U.S.L.W. 4898 (June 21, 1990); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989); *Tull v. United States*, 481 U.S. 412 (1987); and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

WLF believes that individuals and businesses are entitled to rely on the plain language of a statute. Legislative history should not be elevated over statutory language when a statute is clear and unambiguous.

Amicus submits this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

Amicus is, in the interest of brevity, providing only a condensed statement of the facts of this case. *Amicus* adopts by reference the statements of facts contained in Petitioners' briefs.

This case concerns the attempt by the Federal Energy Regulatory Commission (Commission) to adopt a rational and efficient procedure for regulating prices of natural gas which was already in production to the interstate market prior to 1977 (hereinafter sometimes referred to as "old" gas). The Natural Gas Policy Act of 1978 (NGPA) gave the Commission the authority to set ceiling prices for old gas, subject to certain restrictions discussed below. The Commission responded three and one-half years ago by issuing Orders No. 451 and 451-A (Order 451). This order collapsed all vintages of pre-1977 gas into a single vintage with a ceiling price set equal to the ceiling price for post-1974 vintage old gas. Order 451 was promulgated as an integral and critical component of a comprehensive package of reform orders and, for that reason, did not directly address the "take or pay" issue which was addressed by Commission Order No. 436. 51 Fed. Reg. 22,174-175, 46,783-784 (1986).

The Commission determined that Order 451 could save 11 trillion cubic feet of natural gas that would otherwise be lost to premature abandonment and could reduce overall prices to consumers. 51 Fed. Reg. at 22,172, 46,766; *see* 51 Fed. Reg. at 22,195-204.

The Commission also determined that Sections 104(b)(2) and 106(c) of the NGPA had given it the clear and unambiguous authority to so modify the ceiling prices of old gas. 51 Fed. Reg. at 22,179; *see also* 51 Fed. Reg. at 22,171, 22,174, 46,764.

After extensive cost studies, hearings, and deliberations, the Commission concluded that the ceiling price for post-1974 gas was a just and reasonable price for all pre-1977 gas since it approximated the replacement cost of the gas, represented the marginal opportunity

cost of using existing gas, and was below the ceiling price of new gas. *See* 51 Fed. Reg. at 22,185, 46,778; 51 Fed. Reg. at 22,187, 46,772.

A divided panel of the Court of Appeals for the 5th Circuit vacated Order 451 on September 15, 1989. The majority held that the Commission had exceeded its statutory authority by setting a ceiling price higher than the then current market price, an act which, in its opinion, amounted to "de facto deregulation." *Mobil Oil v. F.E.R.C.*, 885 F.2d 209, 216 n.15 (5th Cir. 1989). The majority's holding ignored the plain language of Sections 104(b)(2) and 106(c) of the NGPA and accorded no deference to the Commission's interpretation of its mandate. *See Mobil Oil*, 885 F.2d at 218-220. Judge Brown dissented, finding, *inter alia*, that the majority had "[s]ubstitute[d] its own judgment for that of the Commission on what Congress has ordained the Commission may do about the grave problems of the natural gas business." *Mobil Oil*, 885 F.2d at 226.

SUMMARY OF ARGUMENT

Amicus contends that a court reviewing actions of a regulatory agency must adhere to the statutory meaning or the legislative intent of the statute under which the agency has acted. This Court has consistently held that the surest indication of legislative intent is the language the Congress used when it wrote the statute. Other indications of legislative intent may, on occasion, be employed, but none may be used to override the unambiguous meaning of plain words comprising the statute itself.

The majority of the court of appeals chose to disregard the plain language of critical portions of the NGPA and, instead, seized upon disjointed fragments of

legislative history to attribute to Congress an intent absent from the statutory language. *Amicus* submits that the majority below is wrong in its standard of review of Commission action because of the elevation of legislative history over the unambiguous words of the statute in deciding whether the Commission acted within its delegated authority. The elevation of legislative history over statutory language is improper because it is contrary to a multitude of decisions of this Court and principles of statutory construction embraced by the Court from its earliest days.

The majority's elevation of legislative history over statutory language is also improper because it undermines one of the principal obligations of government to its citizens: to provide fair notice and certainty for people and businesses as to the rules of law enacted by the Congress. When the Congress speaks, it speaks through the laws it enacts, and if the language of those laws can be erased or modified by unseen and unknown factors, such as obscure floor remarks buried in the abundant pages of the *Congressional Record*, fair notice and certainty become impossible.

Finally, *amicus* submits that the majority below failed to utilize the appropriate standard of review of agency action by disregarding the two-prong test announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and carried forward in other decisions of this Court, including *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988). The *Chevron* test is clearly applicable to the facts of this case and should have been followed by the court below. Even if the majority below had made an erroneous determination of legislative intent, the second prong of the *Chevron* test would have required that Order 451 be left in place as a reasonable agency

response to a statute the majority would necessarily have had to find ambiguous.

ARGUMENT

I. THE COURT OF APPEALS' USE OF ISOLATED FRAGMENTS OF LEGISLATIVE HISTORY TO DEFEAT THE PLAIN MEANING OF SECTIONS 104(b)(2) AND 106(c) AS A MEANS OF DETERMINING LEGISLATIVE INTENT VIOLATES CONTROLLING PRINCIPLES OF LAW ESTABLISHED BY THIS COURT

Section 104(b)(2) of the Natural Gas Policy Act of 1978, which in all relevant respects is identical to Section 106(c) of the same Act, provides:

> Ceiling prices may be increased if just and reasonable--The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is--
>
> (A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and
>
> (B) just and reasonable within the meaning of the Natural Gas Act.

15 U.S.C. § 3314(b)(2); *see also* 15 U.S.C. § 3316(c).

It is impossible to read the words of the statute in any other way except that Congress delegated to the

Commission the authority to raise the ceiling prices of all vintages of old gas, as long as the new ceiling prices were just and reasonable within the meaning of the Natural Gas Act. In spite of this clear and unambiguous delegation of authority, the majority below held that by "abrogating the vintage pricing structure" for old gas by way of Order 451, "the Commission has exceeded its authority under the NGPA." *Mobil Oil*, 885 F.2d at 220-21.

In the view of the majority below, the scope of the Commission's authority to modify the vintage pricing structure for old gas was established, not by the words Congress wrote into the statute, but by various disjointed fragments of legislative history. The legislative history cited by the majority consists of floor remarks by Senators McIntyre, Jackson, Hart, and Domenici, and Representative Sharp. *Mobil Oil*, 885 F.2d at 218-19. None of the cited floor statements directly addressed the question of whether the NGPA prohibited or intended to prohibit the Commission from raising the ceiling prices for old gas as long as it complied with the requirements of Sections 104(b)(2) and 106(c).[1]

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[1] The majority fails to mention that Senator Domenici submitted a letter to the Commission when the meaning of his quoted statement was put in question advising that his remarks were a response to contentions that old gas was to be deregulated by the NGPA. Senator Domenici further stated that in his view, the Commission had always had and still retains authority over vintaging of old gas. 51 Fed. Reg. at 22,179 (letter to the Commission). The majority's opinion also refers to a law review article for "additional discussion of the legislative history of the NGPA . . . ." *Mobil Oil*, 885 F.2d at 219 n.22. A thorough review of that article fails to disclose any legislative history supporting the majority's decision on this issue. *See* Note, *Legislative History of the Natural Gas Policy Act*, 59 Tex. L. Rev. 101 (1980).

The majority disregarded the plain language of the statute in favor of some scraps of legislative history that, in contradiction of the statute's plain language, "support the conclusion that Congress did not intend for the Commission to abrogate, as Order 451 has done, the NGPA prescribed pricing structure." *Mobil Oil*, 885 F.2d at 219.

It has become increasingly necessary in recent years for courts to interpret or construe legislative enactments. Indeed, statutory construction is now the primary focus of a majority of the cases that come before this Court.[2] As the Congress increasingly relies on administrative agencies to implement and enforce legislation after its enactment, the courts have struggled with the increasing involvement of agencies in construing and interpreting congressional enactments. Through it all, and to this day, the fundamental guiding principle for courts and agencies has been to determine and adhere to the will of Congress as expressed in its written product.[3]

Determination of the will of Congress has often been an exceedingly difficult proposition, and various interpretive principles have been utilized in fluctuating

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[2] Speaking of this phenomenon in 1947, Justice Frankfurter commented that cases before this Court "not resting on statutes are reduced almost to zero." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 527 (1947). *See also* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 408-11 (1989).

[3] "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982)("It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results . . . lies with Congress and not with this Court.").

degrees during the past to achieve that goal, or at least systematize the process by which the goal is pursued.[4] Canons of construction, for example, have enjoyed varying levels of popularity and utilization depending upon the makeup of the Court from time to time. *See* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 451-462 (1989).

In the earliest days of the Republic, the Court adhered closely to the so-called "English rule" by determining the will of Congress almost exclusively through the words contained in the statutes passed by Congress. As the regulatory apparatus of government grew, there was a shift toward the use of information from sources other than statutory language to help determine the legislative intent of congressional enactments. These other sources included not only the aid to construction principles and canons of construction previously mentioned, but also legislative history. As used herein, and as generally used, *amicus* submits, "legislative history" means any information or material that originates in the Congress, but is not a part of the statute itself. Committee reports and remarks of senators and representatives on the floor of their respective House of Congress are the most common sources of legislative history.

As legislation has become more complicated and voluminous, there has been an increasing tendency to utilize legislative history for a variety of purposes, not all consistent with or supportive of the legislation to which it is linked. In fact, one author has described the

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[4] Holmes, *supra* note 3, at 419. ("the purpose of written instruments is to express some intention or state of mind of those who write them . . . . The question is how far the law ought to go in aid of the writers.").

growth in making legislative history as having generated a "cottage industry."[5]

Just as the making of legislative history has flourished in the legislative process, so has the utilization of it as a source for determining legislative intent in the construction of congressional enactment. *Amicus* submits that this phenomenon has developed into a kind of a game, something akin to an Easter egg hunt where the adults are careful not to hide the eggs too well, otherwise they might never be found. Just as in the typical Easter egg hunt, the objective of making legislative history is not to hide tidbits of legislative history so well that they will never be found, but so that they will be found, and having been, will provide the key to "legislative intent."[6]

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[5] In expressing his view of some of the practical problems flowing from the use of legislative history in statutory construction, Kenneth Starr, then on the bench of the Court of Appeals for the District of Columbia Circuit, observed that: "It is well known that technocrats, lobbyists, and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute." Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 371, 377 (1987).

[6] Representative Hechler purposely created an example showing how easily legislative history can be created and abused: "Mr. Speaker, having received unanimous consent to extend my remarks in the **RECORD**, I would like to indicate that I am not really speaking these words. . . . As a matter of fact, I am back in my office typing this out on my own hot little typewriter, . . . Such is the pretense of the House that it would have been easy to just quietly include these remarks in the **RECORD**, issue a brave press release, and convince thousands of cheering constituents that I was there fighting every step of the way, influencing the course of history in the heat of debate." 117 Cong. Rec. 36,509 (1971) (Statement of Rep. Hechler).

The starting point in the search for legislative intent is in the words of the statute. As Justice Cardozo put it so well and so succinctly in describing the proper role of this Court in construing statutes: "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27 (1933). And, as Justice Frankfurter observed, "While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947). *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

This Court has held that when free from ambiguity, the words of the statute must control over other proposed interpretations based on extraneous indications of legislative intent. "We think that the 'fragments of legislative history' on which . . . the Court of Appeals relied do not constitute 'a clearly expressed legislative intent contrary to the plain language of the statute.'" *United States v. James*, 478 U.S. 597 (1986), quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982); *see Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

This rule of plain meaning was rejected by the majority below and in its rightful place, as the primary determinant of legislative intent, the majority chose an exceedingly poor substitute -- remarks by four different senators and one representative during floor debate on the bills which became the NGPA.

We submit that the issue is not simply an academic debate concerning the primacy of various sources of

legislative intent, based on whether the source is included in the formal language of a statute. At bottom, the issue is one of adherence to the constitutionally mandated division of authority and responsibility between the branches of government. The creation of statutes is the function of the legislative branch, not the judicial branch.[7] A court crosses the Constitutional line between enacting and interpreting when, under the guise of a "search for meaning," it divines the will of Congress not in the words of the statute but in scattered fragments called "legislative history." And, when the Congress has spoken, the courts are not free to change the law by interpretation. Only the Congress may change the law.[8]

In the instant case, the majority below usurped the legislature's assigned role by concluding, in contradiction to Congress' own enacted words, that four senators and one representative spoke for the entire Congress. In effect, the majority set itself up as a two-member

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[7] Justice Frankfurter perhaps best articulated this principle: "But there are more fundamental objections to loose judicial reading. In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language. In the keeping of legislatures perhaps more than any other group is the well-being of their fellow man. Their responsibility is discharged ultimately by words." Frankfurter, *supra* note 2, at 545-546.

[8] *United States v. James*, 478 U.S. 597, 612 (1986) ("[O]ur role is to effectuate Congress' intent. . . . If that provision is to be changed, it should be by Congress and not by this Court."); *United States v. Locke*, 471 U.S. 84, 95 (1985) ("Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result.").

superlegislature and passed a new and different law with respect to the authority of the Commission to collapse the vintages of old gas and set a higher regulated price for such gas. The use by the majority below of wisps of legislative history to override the plain language of Sections 104(b)(2) and 106(c) is a violation of the controlling legal principles and precedents. Such action must be overruled. *United States v. James*, 478 U.S. 597 (1986); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *Rubin v. United States*, 449 U.S. 424 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

II. THE COURT OF APPEALS' IMPROPER RELIANCE UPON PORTIONS OF THE NGPA'S LEGISLATIVE HISTORY TO VACATE ORDER 451 IMPOSES UNREASONABLE BURDENS AND UNREASONABLE UNCERTAINTY ON THE NATURAL GAS INDUSTRY AND COULD LEAD TO UNFAIR CONSEQUENCES NOT REASONABLY FORESEEABLE FROM A THOROUGH EXAMINATION OF THE STATUTE

Members of a free society are entitled to clarity and certainty to the maximum possible extent in matters that shape their lives, govern their actions, measure their satisfaction of obligations, and enable the realization of their rights. In order to function productively in our modern society, individuals and businesses must be able to determine what is expected of them in the enterprises and endeavors in which they are engaged. For every entity involved in a federally regulated industry, applicable statutes enacted by Congress constitute an important part of the legal framework governing such involvement.

Individuals and businesses relied in good faith on Order 451 in structuring and restructuring their dealings with one another. Just as they have a right to expect that other parties will honor the contracts they have negotiated, so do they have a right to expect that the legal framework put in place by Congress will be honored. If the court order vacating Order 451 is allowed to stand, then the disruption in the affairs of thousands of citizens will be a direct result of their misplaced reliance on the actions taken by the Commission in carrying out clear directives of the Congress contained in Sections 104(b)(2) and 106(c) of the NGPA.

The decision rendered by the majority of the court of appeals brings into sharp focus an issue of fundamental importance: Should producers, pipelines, consumers, and others have relied on the Commission's action in issuing Order 451 and, indeed, should regulated industries ever comfortably rely upon similar agency actions when the possibility of potentially contrary legislative history lurks somewhere in a statute's pre-enactment background? If, in issuing Order 451, the Commission had "made a blunder so large" that it was obvious the courts must correct it, as Respondents contend, Brief of Respondents, United Distribution Companies, *et al.*, for Certiorari at 19, then only parties who were extremely foolish or naive would have acted in reliance thereon.

The parties that structured their dealings and relationships based on reliance on Order 451 were neither foolish nor naive. They relied on the Commission's well-considered and painstakingly documented action in full knowledge that the Commission was the governmental agency to which Congress had delegated

primary jurisdiction over natural gas pricing. Likewise, the parties were fully aware that Congress had given the Commission clear and express authority, through Sections 104(b)(2) and 106(c) of the NGPA, to raise ceiling prices of old gas, so long as the new ceiling prices were "just and reasonable," as that standard has been variously applied by the Commission under the NGA. 51 Fed. Reg. 22,179 (1986) (Commission conclusion as to authorization for ceiling price increases); *see also Mobil Oil Co. v. FPC*, 417 U.S. 283, 308 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 775-777, 790, 799-800 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942) (just and reasonable standard does not require use of specific formula). The Commission expressly found that the new ceiling prices established by Order 451 were "just and reasonable." 51 Fed. Reg. at 22,182-185, 46,766-768.

Many parties involved in the natural gas industry relied on the authorized actions of the Commission, secure in the belief that courts would adhere to the plain language of the NGPA, or, at least, pay great deference to Order 451 since that order was promulgated in accordance with the express authority delegated by the Congress.

Further, the parties acting in such reliance were neither naive nor foolish in placing their faith in the clear language of the statute rather than isolated fragments of legislative history. As the Court has held from *Caminetti* to *Locke*, legislative history is not even to be considered by courts interpreting statutes when the language of the statute is clear. *Caminetti v. United States*, 242 U.S. 470, 490 (1917) ("If the words are plain, they give meaning to the act, and it is neither the

duty nor the privilege of the courts to enter speculative fields in search of a different meaning."); *United States v. Locke*, 471 U.S. 84, 95 (1985) ("the fact that Congress might have acted with greater clarity or foresight does not give the courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do").

This "plain meaning rule" has not only been the law of the land for generations, but is also the course dictated by simple logic, basic fairness, and our tripartite form of government. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) (Congress to "formulate legislative policies . . . Executive to administer the laws . . . courts to enforce them").

Given that many members of Congress who vote for a bill will not have any of their thoughts about that bill on the record and that some may even be voting "in spite of," rather than "because of" the statements which others have placed on the record, the only fact that can be ascertained with any certainty is that all members voting for the bill were in sufficient agreement with the *language of the bill* to place their name on the indelible record of Congress as having voted for the bill. While *statements* made can later be clarified, or even retracted, *votes* are permanent and votes are for or against the language of the statute.[9]

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[9] *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring in the judgment) ("Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); *see also Edwards v. Aguillard*, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting) (providing a purportedly non-exhaustive list of 12 potential reasons a legislator may have voted for a statute, none of which would be ascertainable from legislative history).

Businessmen are put on notice by the acts of Congress, and by the regulations issued by the duly designated agencies given rule-making and other administrative authority by Congress, that there are certain governmental requirements to which their actions must conform. When these governmental requirements are expressed in agency regulations, those regulations provide the background for all business decisions and actions that fall within their scope. The best laws and regulations are the ones which are the easiest to interpret and apply, since all parties to a business transaction may then be more confident that the decisions they make and actions they take are based on the same background of information.

Charging businessmen with interpretation of not only the statutes and regulations pertaining to business transactions, but also the subjective intent of different members of the Congress -- often vaguely expressed by mere floor debate preceding the enactment of the laws which gave rise to the regulations -- is manifestly contrary to the rule of law. Even the courts, which enjoy the luxury of an adversarial presentation and are blessed with an amount of time which is not tied to the exigencies of the world of business and industry to arrive at a decision, are quite correctly reluctant to consider mere political rhetoric in statutory construction of laws which are clear on their face. Holmes, *supra* note 3 ("We do not inquire what the legislature meant; we ask only what the statute means.").[10]

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[10] *See also Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (criticizing "exhaustive analyses" of legislative history "where the language of the enactment at issue is clear."); *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring) ("Resort to legislative history is only justified where the face of the act is inescapably ambiguous.").

Certainly, the courts do not want to further burden the already overloaded judicial system by encouraging litigation that results when affected parties try to guess the intent of Congress, act upon their best guess, and then resort to the courts for an adjudication when other parties to their transactions had operated under different expectations regarding congressional intent. As unfit to determine the subjective intentions of Congress as the courts have claimed to be, businessmen can justifiably claim to be even more unfit to accomplish this task.

The need for certainty in the rules governing business transactions is even greater today than in times past. The inherent risks of producer participation in the natural gas industry are extensive enough without the potential for the disruption of years of transactions by the subsequent reinterpretation, based on mere political rhetoric, of laws that are clear on their face. Shadowy fragments of legislative history provide an exceedingly shaky foundation for making business decisions; they provide even weaker basis for courts to cause extensive disruptions to the commerce of an entire industry.

All citizens must rely on and follow rules as they exist. Businessmen must rely on these agency regulations without waiting years for each one to be interpreted, or reinterpreted, by the courts. This Court has long recognized the critical relationship between businesses and the agencies that regulate them and has sought to increase the ability to rely on agency actions by instructing courts to pay great deference to agency determinations, except where the agencies have violated the clear and express intent of Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988). The confidence that

businessmen can place in agency determinations helps pave the path of the nation's commerce. Vacating Order 451 would place a sign on this path cautioning businesses to proceed at their own risk, or not at all, until or unless applicable statutory enactments and duly promulgated regulations have been measured against fragments of legislative history not a part of the statutory enactment itself.

III. THE COURT OF APPEALS IGNORED BINDING PRECEDENT OF THIS COURT BY REFUSING TO GIVE DEFERENCE TO COMMISSION ACTION WHEN THE LEGISLATIVE INTENT OF THE NGPA WAS PUT IN ISSUE BY THE CONFLICT BETWEEN STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

The majority decision of the court below fails to even mention *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or the standard of judicial review enunciated in that case. When an agency has interpreted a statute, *Chevron* requires the reviewing court to first determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the court, as well as the agency, "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If not, that is, "if the statute is silent or ambiguous," *id.* at 843, the court must defer to the interpretation of the agency, unless it is clearly unreasonable. *Id.* at 845. Had the majority below applied *Chevron's* two prong test for determining the validity of Order 451, it would have been forced to hold that Order 451 is a valid regulatory implementation of NGPA Sections 104(b)(2) and 106(c).

As to the first prong of the *Chevron* test, the "precise question" presented in the court below was whether the Congress empowered the Commission to raise the ceiling prices of all old gas vintages, provided that the new ceiling prices selected satisfied the Natural Gas Act's standard of "just and reasonable." Congress provided, through the plain language of Sections 104(b)(2) and 106(c), an unambiguous affirmative answer to that question. The majority below would have had to reach that same conclusion but for use of dubiously relevant legislative history to achieve a result that is in conflict with the statute's plain language.

Even if the majority were correct in ignoring the language of the statute, the court's inquiry would not be at an end; the *reasonableness* of Order 451 as the Commission's interpretation of NGPA Sections 104(b)(2) and 106(c) would then need to be addressed. This "second prong" of the *Chevron* test requires that the court defer to reasonable agency action.

When the second prong of the *Chevron* test is required, the court is not free to construe the statute as if writing on a clean slate. The court's scope of review is very limited indeed, that being solely to determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843 (citations omitted). "If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K Mart*, 486 U.S. at 292, citing *United States v. Boyle*, 469 U.S. 241, 246 n.4 (1985).

In this case, when the deference to reasonable agency action required by *Chevron* and *K Mart* is accorded Order 451, it must be found to be a valid Commission regulation pursuant to the delegation of

authority found in Sections 104(b)(2) and 106(c) of the NGPA.

CONCLUSION

The plain language of Sections 104(b)(2) and 106(c) clearly authorized the Commission to raise old gas prices in the manner adopted by the Commission in Order 451. The court of appeals ignored the plain language of the statute and relied, instead, upon fragments of legislative history to hold that the Commission had exceeded its authority relating to pricing of old gas. In so doing, the court of appeals violated important principles of law, requiring that its holding be reversed.

Amicus respectfully requests that the judgment of the court of appeals be reversed.

Respectfully submitted,

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Dated: August 9, 1990